Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARY E. HOGAN, COLE TAYLOR BANK, AS TRUSTEE UNDER TRUST NO. 77-432 DATED DECEMBER 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,

Petitioners,

v.

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In December, 1990, the Village of Lake Barrington (Respondent) hired John Reindl as a special projects coordinator to coordinate the creation and implementation of a special service area. (C-1115[1]) The special service

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[1] The references to the record before the Illinois Appellate Court are included as "(C-. . .)".

area would be benefitted by the installation of a potable water line system to service the properties together with a water supply and storage system, certain drainage improvements, and a sanitary sewerage collection system in an area known as the Lake Barrington Industrial Park. ("Park") The improvements would also include reconstruction and rehabilitation of certain roads, the cost of which would be paid by the Village, not assessed through the special service area. (C-759, 760) The Park does not have sewer or municipal water, but is served by individual well and septic systems. (C-811) The Park receives fire protection from the Village of Barrington through an intergovernmental agreement. Presently, the lack of a municipal water supply severely hampers the ability of the fire department to fight fires within the Park. Over the past several years, the Fire Department has had to fight several significant fires within the service area. In several instances, despite best efforts by the fire department and as many as twelve neighboring fire departments, the fire department was unable to prevent the fires from causing total losses of the buildings and contents. This is due primarily to the lack of a municipal water supply for the special service area. As a result, the fire department is forced to tank in the water for fire-fighting purposes. This alternative is much slower, and prevents the fire department from putting enough water on the fire in a quick enough response to have a meaningful effect on the fire. In the opinion of the fire chief, Steven Figved, the installation of a municipal water system through the special service area will significantly improve the ability of the Fire Department to put out fires within the Park. The system would also provide property owners with the opportunity to install sprinkler systems within their buildings, with a potential for sig-

nificant reduction in their insurance premiums. Even without the installation of sprinkler systems, property owners should experience significant reductions in casualty insurance premiums due to the installation of the municipal water system. (C-773-774)

Mr. Reindl initially canvassed the proposed special service area to ascertain the degree of support, which existed for the proposed project. (C-759-760)

After the canvass, the Village held two public informational meetings on January 22, and April 22, 1992, for the property owners, who had been invited to attend. Professional consultants were present to explain the project, including the engineering and financing aspects. (C-760)

After the two informational meetings were held, the Village elected to go forward on the project. It adopted its first ordinance, 92-O-22, on July 7, 1992 (C-248-256), which established a public hearing date of July 29, 1992.

The Village then proceeded to satisfy the statutory notice requirements. Notice of the hearing was published in the *Daily Herald* on July 13, 1992. (C-351-352) The notice was also mailed to the persons or persons in whose names the general taxes for the preceding year had been paid, based on the information provided to Mr. Reindl by the Lake County Treasurer's office. (C-232-233, 1116) The notices were sent by first class mail *and also by certified mail.* (C-1116)

The Petitioner, Ruth Loiacano, one person of two persons in whose names the taxes had been paid for a single parcel (PIN 13-28-202-008, C-897), contended that she was not mailed the notice (C-881), but did not ever suggest that she did not *receive* the notice, that she was not

aware of the public hearing, that she did not attend the public hearing, or that she was in any way prejudiced by the alleged failure to mail her the notice. The notice was sent to the Loiaconos, and was signed for by her husband, Sam Loiacono. (C-1116, 1154, 1155) She did file a statutory objection. (C-328)

Various newspaper articles also reported on the proposed special service area (C-1197-C-1203), and at least one article reported the date of the public hearing. (C-1200-1201)

The public hearing was held on July 29, 1992. At that time, the public was afforded the opportunity to comment and ask questions. The Village's professional consultants also attended this hearing and were available to explain the project and to answer questions. (C-233, 258-308)

After the hearing was adjourned on July 29, 1992, certain objections were filed (C-310-340), which included the objections of the Petitioners, Mary Hogan, Sam Loiacano (C-329), and Ruth Loiacano. (C-328) However, the objections had no legal impact on the proceedings as they were insufficient in number to aggregate the required 51% to prevent the creation of the special service area, the levy of taxes, and the sale of bonds. Specifically, only 2 of the 5 registered voters signed objections, and only 46 out of 127 owners of record filed objections. (C-233-234)

The Village elected to move forward on the project. It adopted Ordinance 92-O-35 on October 20, 1992, which established the special service area. (C-342-353) The special service area, as established, consisted of 100 separate parcels and 127 owners of record. (C-233-234) It adopted Ordinance 92-O-36 on November 17, 1992, which provided for the levy of taxes and sale of bonds in the aggregate amount of $7,000,000.00. (C-355-380)

The Village has expended in excess of $645,568.99 upon the special service area, including $396,681.99 for engineering services and $96,366.39 for administrative services and costs. (C-1458, 1471, 1474-1478)

On January 5, 1993, the Village filed a two-count complaint against Mary Hogan, Sam Loiacono, Ruth Loiacono, certain other parties, and certain unknown owners. The complaint sought a declaration of the validity of the special service area ordinances, as well money damages for tortious interference with contract. (C-1-156). This complaint was dismissed by the circuit court. The Village then filed an amended complaint (C-226) with leave of court. (C-229-394) The amended complaint consisted of three counts. Count I sought a declaration of the validity of the special service area ordinances. Count II was a claim for tortious interference with contract, and Count III was a claim for tortious interference with prospective economic advantage.

The Petitioners filed a counter-complaint and third party complaint. (C-424-432) Counts I and II were 42 USC 1983 actions for damages for alleged violation of the First Amendment and equal protection provisions of the U.S. Constitution.

The circuit court dismissed with prejudice Counts II and III of the Village's amended complaint. (C-447, 448)

The Petitioners filed a Counterclaim, in which they sought a declaration that the special service area ordinances were invalid (C-520-582), and also filed their First Amended Counter-complaint and Third Party Complaint on July 28, 1993. (C-583-626) The theories of Counts I and II remained the same; First Amendment and equal protection claims for damages. The Lake Bar-

rington Industrial Park Association filed a petition to intervene, which was granted. (C-633)

The Village filed a motion to dismiss the Amended Counter-complaint (C-641-658), as did the third party defendant, James Bateman (Village Attorney). (C-689-699) The circuit court dismissed with prejudice Count I (First Amendment) of the First Amended Counter-complaint. (C-817-818)

The Village filed its motion for partial summary judgment (C-736-815) as to Count I of its Amended Complaint (declaratory judgment) and Petitioners' Counterclaim for Declaratory Judgment and subsequently filed a reply in support of the motion. (C-1092-1204) The Petitioners filed a cross motion for summary judgment (C-850-853), which was later amended. (C-963-1042)

On March 30, 1994, hearing was held on the cross motions for summary judgment. The circuit court ruled that the notice mailed by the Village did not satisfy the statute for service upon individual owners and also held that the notice was insufficient in content, but did not specify any particular defect. (C-1406-1407) The Village was granted leave to file its motion for summary judgment as to Count II of the Counter-complaint (equal protection), which was granted. (C-1437)

The circuit court entered summary judgment in favor of the Petitioners on the declaratory judgment actions regarding the validity of the special service area ordinances (C-1503-1504), and the Respondents filed their Notice of Appeal. (C-1500-1502)

In its May 2, 1995, opinion (App. 1 through App. 22 to the Petition for Writ of Certiorari), the Illinois Appellate

Court reversed the circuit court and found the special service area ordinances valid, but excised the Loiacono parcel from the special service area, because the Court found lack of notice to Ruth Loiacono. The Appellate Court also reversed the circuit court's grant of summary judgment to the Village and James Bateman as to Count I of the cross-claim, which alleged a cause of action for damages for an alleged First Amendment violation. As to that issue, the Appellate Court held that Bateman did not enjoy qualified immunity from the damage claim. In all other respects, the circuit court was affirmed. *The case was remanded for further proceedings consistent with the opinion.* These proceedings would involve a trial on the merits of Count I of the Counterclaim, the First Amendment claim, and entry of summary judgment in favor of the Respondents, finding the special service area ordinances valid.

REASONS TO DENY THE WRIT OF CERTIORARI

There are at least five dispositive reasons why a writ of certiorari should be denied.

A. NOT A FINAL ORDER

The decision of the Illinois Appellate Court is not a final order within the meaning of 28 USC 1257(a). Section 1257(a) specifically requires that the order appealed from be final. The case has been remanded for further proceedings to the Illinois circuit court. These proceedings would include a trial on the merits of Count I of the Petitioners' counterclaim, the first amendment claim,

and entry of summary judgment in favor of the Respondents finding the special service area ordinances valid. After the case is fully resolved at the circuit court level, the non-prevailing parties would have the right to appeal once again to the Appellate Court regarding the First Amendment claim. Ill. Sup. Ct. R. 301. After the Illinois Appellate Court decided that appeal, any party could once again seek leave to appeal to the Illinois Supreme Court. Ill. Sup. Ct. R. 315. If the Illinois Supreme Court granted the petition, the entire case would be before it, including the issues previously addressed in the Illinois Appellate Court opinion, from which the Petitioners now seek a writ of certiorari. *Sjostrom v. Sproule* (1965) 33 Ill. 2d 40, 210 N.E.2d 209; *Anderson v. Board of Education of District No. 91* (1945) 390 Ill. 412, 61 N.E.2d 562; *Frank v. Salomon* (1941) 376 Ill. 439, 34 N.E.2d 424; *Schrock v. Shoemaker* (1994) 159 Ill. 2d 533, 640 N.E.2d 937, 939; Ill. Sup. Ct. R. 318, 366. Since the order is not final, indeed, since it is a long way from being final, the petition for a writ should be denied. *Flynt v. Ohio* (1958) 451 U.S. 619, 101 S.Ct. 1958, 1959-1961, 68 L.Ed. 489; *O'Dell v. Espinoza* (1982) 456 U.S. 430, 102 S.Ct. 1865, 1866, 72 L.Ed. 237.

B. NO FEDERAL QUESTION RAISED

28 USC 1257(a) requires that a federal question be raised to invoke the jurisdiction of the United States Supreme Court. The petition for writ lists in its Table of Authorities the Fourteenth Amendment to the United States Constitution. However, the argument portion of the petition, which is titled "Reasons for Granting the Writ of Certiorari" fails to explain how the Fourteenth Amendment is even remotely involved in the special ser-

vice area creation process. Indeed, the petition does not even mention the Fourteenth Amendment, how it was possibly contravened, nor the term "due process", anywhere in its argument. The petition does not hint how the request for a writ satisfies Sup. Ct. R. 10. The petition does not satisfy Sup. Ct. R. 14(1)(g)(i) in that it fails to indicate how and when a federal issue was raised in the State court proceeding. This is understandable, since no federal issue was raised by the Petitioners before the Illinois Appellate Court, nor the circuit court. Since the petition for writ establishes neither a federal question, nor that any federal question was even raised, the petition should be denied. Sup. Ct. R. 10 and 14; 28 USC 1257(a); *Illinois v. Gates* (1983) 462 U.S. 213, 103 S.Ct. 2317, 2321-2324, 76 L.Ed. 257.

C. NOTICE ISSUE IS MOOT

The Petitioners have failed to assert an actual controversy regarding the issue of notice to the property owners of the creation of the special service district. It is undisputed that Sam Loiacono and Mary Hogan were mailed the notice prescribed by 35 ILCS 235/5. The Defendants have never contended that the Lake Barrington Industrial Park Association, which does not own any property within the proposed special service area, was entitled to any notice. Nor have the Petitioners ever suggested that Cole Taylor Bank as Trustee under Trust No. 77-432 dated December 19, 1977 was entitled to any such mailed notice. Ruth Loiacono is the only Petitioner who contended that she was not mailed the requisite notice. The Illinois Appellate Court decision addressed her objection that she was not mailed the notice and granted her relief, by excising the parcel, of which she

was a partial owner, from the special service area. Thus, there is no justiciable issue remaining regarding the issue of mailing of notices. This issue is moot, and accordingly, the petition for writ should be denied. *County of Los Angeles v. Davis* (1979) 440 U.S. 625, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642; *Amalgamated Assoc. v. Wisconsin Employment Relations Board* (1951) 71 S.Ct. 373, 374-375. The Petitioners have no standing to complain that other persons may not have been mailed notice. Those other persons are not parties. *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 112 S.Ct. 2130, 2135-2139; *Ciacco v. City of Elgin* (1980) 85 Ill.App.3d 507, 511-513, 40 Ill. Dec. 877, 407 N.E.2d 108.

D. FEDERAL ISSUE WAIVED

Assuming arguendo that the petition for writ asserts a federal question, this issue was waived by the Petitioners by failing to raise it below. The Illinois Appellate Court can hardly be faulted for failing to address an issue not raised by the Petitioners. To the extent that the petition for writ raised any federal question, this issue was waived by the Petitioners by failing to raise the issue below. *Youakim v. Miller* (1976) 425 U.S. 231, 96 S.Ct. 1399, 1401; *Illinois v. Gates* (1983) 462 U.S. 213, 103 S.Ct. 2317, 2321-2324, 76 L.Ed. 257. The petition for writ should therefore be denied.

E. NO BONA FIDE ISSUE RAISED

Even if one ignores the fatal defects of the petition for writ, which have already been discussed, the Petitioners have failed to raise a bona fide issue for review by this Court. The Petitioners fail to explain how the alleged

failure to mail notice to certain non-parties, who may have had actual notice through the publication notice or had seen the notice that was mailed to their co-owners, or who otherwise have expressed no quarrel with the creation of the special service area, presents a federal question, which is ripe for review. The Petitioners fail to explain how the two cases upon which they rely, which antedate the creation of the special service district by over one hundred years, present a federal question. Illinois courts have held the notice requirements of the special service area statutes are not jurisdictional, but rather directory in nature. *Grais v. City of Chicago* (1992) 151 Ill.2d 197, 601 N.E.2d 745; *Village of Lake Barrington v. Mary Hogan* (1995) 272 Ill.App.3d 225, 649 N.E.2d 1366, 208 Ill. Dec. 705; *Andrews v. Madison County* (1977) 54 Ill.App.3d 343, 12 Ill. Dec. 35, 369 N.E.2d 532. Neither *Lyon v. Alley* (1889) 130 U.S. 177, nor *French v. Edward* (1872) 80 U.S. 506, point to a different result. In both of those cases, the Supreme Court was dealing with the issue of the directory versus mandatory nature of the obligations bestowed upon certain officers in the discharge of their official duties. In both cases, the aggrieved parties stood to lose title to their properties because of substantial non-compliance with the statutory requirements, such as failing to sell only the smallest portion of the property to satisfy the delinquent tax, as in *French*. Here, the Petitioners do not suggest how they are even remotely aggrieved by the alleged failure to mail notice to certain other persons, who are not parties. The Petitioners have failed to raise a bona fide issue that would warrant review by the United States Supreme Court.

CONCLUSION

For any and all of the reasons stated herein, the petition for writ of certiorari should be denied. A fair reading of the petition yields the conclusion that it is without merit, and was filed solely for the purpose of delay. The Plaintiffs, who have spent in excess of $645,000 to create the special service district to provide sewer and water and greatly enhanced fire-fighting capability to the industrial park, respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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